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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 1077

ALBERT I. CASSELL
Petitioner

vs.

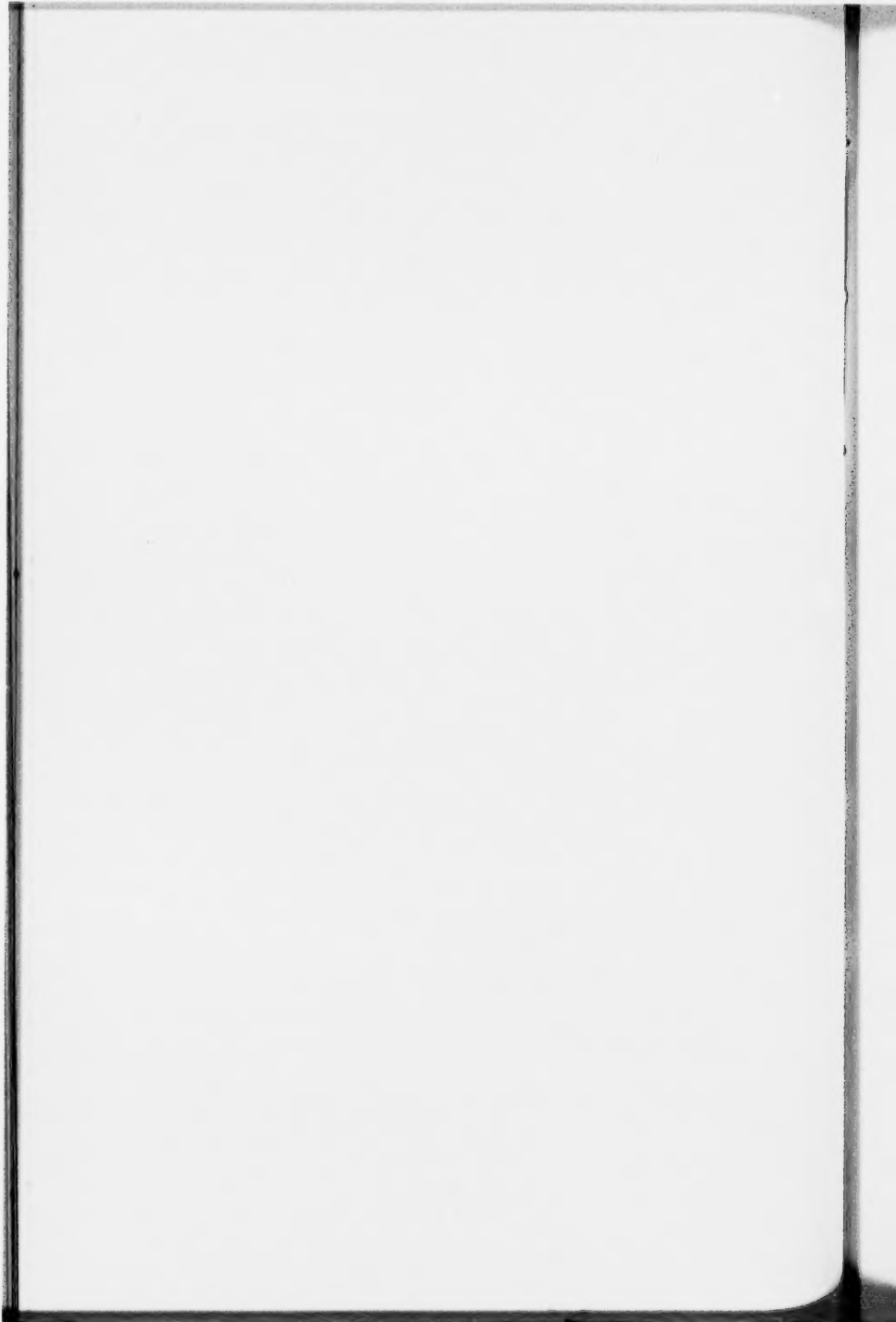
HOWARD UNIVERSITY, a Corporation
Respondent

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

**TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA**

GEORGE E. C. HAYES,
Attorney for Respondent.

April 14, 1942.



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STATEMENT

The petitioner seeks a review of a unanimous decision of the United States Court of Appeals for the District of Columbia reversing the judgment of the District Court of the United States for the District of Columbia on the verdict of a jury, in favor of petitioner for \$19,687.50 and remanding with instructions to dismiss the complaint.

The "Statement" as outlined by the petitioner by reason of the fact that it emphasizes only certain phases of the testimony supportive of his theory and leaves out, among other things, the part thereof which had particularly to do with the ruling of the Statute of Limitations, we venture to restate:

Howard University, appellee here, had among its salaried employees one Albert I. Cassell, appellant, who had served the University in various designated capacities; but who from February 8, 1924, until, to wit, June 30, 1933, served as University Architect. It was for a period included in this time of service that the plaintiff below brought suit, said services having allegedly commenced during the summer of the year 1929 and extended to and including the year 1933 (R. pp. 3, 5, and 6).

To the three counts of the Complaint the defendant below interposed several pleas; among which was a plea of the Statute of Limitations, which, in the light of the decision of the Court of Appeals of the District of Columbia and the consequent ground upon which the present petition for writ of certiorari is based, needs be the only one referred to for the purposes solely of this brief opposing the allowance of the writ. Unless the erroneous idea should be given that the "Twenty-year Plan" had to do only with the physical development of the University this Court should know that the plan was a broad scale educational program, of which the physical development was only an incident; and in which connection the entire group of major administrative officers, including the deans of the nine schools, and colleges, the Secretary-Treasurer, and the Architect of the University (R. p. 1182) were called upon to present a twenty-year program so far as their own phases of the work was concerned; and all responded, including the University Architect, as shown by the Record (R. pp. 1182-1184). The proof as offered by the plaintiff below tended to show that as distinguishable from all the other said administrative officers who freely gave their services without pay,

he contributed certain of his services, the evidence showing same to be of large proportions, as gratuities, but that there were certain services rendered by him in his relationship as "Agent for the Extension Committee" for which he claimed he was entitled to be compensated. A reference to the record will not disclose as by the petitioner alleged that he was ever "employed" by the Extension Committee as "Agent" to represent the University, but will show rather that for the purpose of the acquisition of property that three real estate firms were employed with a view of keeping the public from knowing of the interest of the University in such acquisition, and that as a coordinator of this work and a liaison man between the University and such real estate office the said Albert I. Cassell was designated as agent of this Extension Committee. As reflecting upon the running of the Statute of Limitations it is important here to note that the evidence offered on behalf of the defendant University was that no distinction was ever made to it as to the things done by the plaintiff as gratuities and those things for which he claimed the right to compensation and did not know until just prior to the time of the bringing of the suit the alleged basis of the plaintiff's claim and that after learning of same it authorized investigation thereof, but never recognized same, and never promised to pay same. The plaintiff admitted in his testimony that he never made his claim directly to the University through its Trustees as such, but relied upon the alleged promise of the President of the University, denied by the President in his testimony, that he would be compensated for these alleged extra services rendered (R. pp. 692, 693). It is to be noted that both in the interpretation of the testimony adduced and in the recital of his petition for a writ of certiorari, addressed to this Honorable Court, the petitioner uses (Petitioner's Brief, p. 7) without apparent distinction, the statement that petitioner was *employed as agent* and that petitioner was *appointed as agent*. Petitioner's *appointment* as agent the defendant University did not deny;

it did deny his *employment* as agent. The University's position, as developed by the testimony, was that when additional work incident to his appointment as agent was put upon the petitioner during the period for which he sought compensation in his suit, the University saw fit, at his instance, to increase his salary \$1,000.00 and also during this same period assigned him the work of Superintendent of Buildings and Grounds with additional compensation in the amount of \$1,500.00. This is reflected in the letter to Mr. Cassell from the Secretary-Treasurer of the University, dated June 16, 1931, covering the official minutes of the Executive Committee of June 8, 1931 (R. pp. 1262-3); said letter reading in part (R. p. 1251):

"This is to advise that, under the resolution of the Executive Committee of the Board of Trustees, increasing your salary from \$5,000 to \$6,000 for the fiscal year 1931-32, it is the understanding of the Board of Trustees that this amount is to be charged against University Building projects.

"It is also the understanding that the \$1500 which you receive for the supervision of Buildings and Grounds continues during the fiscal year. This, of course, means a total salary of \$6,000 on Government payroll, and \$1,500.00 against University payroll."

Reference is made to this type of communication passing at the time when the matter was in progress as showing the true relationship which existed and not as thereafter assumed as an afterthought; and this relationship we submit has bearing on the question of the running of the Statute to which the decision of the Court of Appeals primarily addressed itself.

There would perhaps be no more emphatic way of showing the error of the plaintiff's position than to add factually to the statement upon which they rely with emphasis to the pretended effect that payment was not due until the "extension activities were substantially completed" and

that land acquisition for the extension program "*continued and was going on in 1933, 1934, and 1935.*" To this might be added that same is at present going on and bids fair to continue for years to come. Is it to be urged by such reference in the petition for certiorari that the running of the Statute was affected by this circumstance; or are we rather to take as a basis for the beginning of the running of the Statute the time when the alleged cause of action accrued, as specifically stated by the petitioner himself and as accepted by the Court of Appeals in arriving at its decision. Accepting for the sake of this argument, although in no wise conceded, the view most favorable to the plaintiff below, that there was an indivisible contract of employment under which as agent for the Extension Committee he rendered services to the University for which he was entitled to be compensated; the record clearly shows that the Extension Committee itself was abolished more than three years prior to the time of the bringing of the suit and that Cassell's activities as the agent for that Committee by his own admissions were concluded, at the latest possible date as of, April 21, 1933. It is to be remembered that the plaintiff filed suit on June 4, 1936. The United States Court of Appeals for the District of Columbia, calling attention to the vast amount of contradictory evidence on the subject as to whether or not Cassell as agent for the Extension Committee was entitled to receive "other and additional compensation", by reason of expressed agreement to pay such compensation or by the acceptance of his services and work, states that it is not necessary to consider this in view of the position taken by that Court that Cassell's "services terminated and his compensation, if he was entitled to any, became payable more than three years (the statutory period) before the suit was begun. And we are unable to find in the record any facts on which to sustain his claim that the running of the Statute for any part of this time was tolled." (R. p. 1660.) Several quotations from the Record, adopted by the Court of Appeals in its

decision, will, we believe, show without question that the Statutory period had run prior to the time of the bringing of the cause of action. The first and definitive step, showing the abolition of the Committee for which Cassell acted as "agent" is shown by the reported action of the Board of Trustees of the defendant University, the only proper way in which the University could function, of which circumstance the Court should take judicial notice since the said University is created by Act of Congress, when on December 5, 1932, it met and adopted the following Resolution:

"Voted, That the responsibility for the management of all real estate of the University heretofore purchased from the Extension Fund, so-called, be assigned to the Treasurer of the University on and after January 1st, 1933, in accordance with the requirement of Article III, Section 5, of the By-Laws.

"Voted Further, That the Committee on Property Extension be required to prepare and submit to the Chairman of the Board a report as of December 31st, 1932, of all properties purchased and managed by it up to the present time, and containing full details showing the rents, encumbrances, insurance carried, expenses, and any other information which the Committee may deem proper.

"Voted Further, That the Board hereby express its thanks to the Committee for its arduous and efficient labors in purchasing and managing the property in question for the University."

It is to be noted in this regard that the plaintiff brought his suit as the agent for this committee (R. p. 351).

What chronologically happened, of importance in this matter of the running of the Statute of Limitations, is concisely and persuasively set forth in the opinion of the United States Court of Appeals for the District of Columbia, from which we quote (R. pp. 1660-1661), with inserted Record references for the convenience of this Court:

"On the following January 4th the Committee requested Cassell to submit by January 20th a comprehensive report of his work and appropriated the sum of \$300 for his bookkeeping and clerical expenses in connection with the preparation of the report. (R. pp. 323-4-5.) On January 5th the president informed Cassell of the committee's action (R. pp. 331-2), and within a week or two thereafter Flexner, Chairman of the Board, requested Cassell to hurry the report; and again in February (R. p. 333) instructed him to turn over promptly to the treasurer of the University all of the records of the extension fund. Then on February 28th (R. pp. 333-4), Flexner telegraphed Cassell, demanding that the records be turned over to the treasurer at once. The same day Cassell telegraphed Flexner that he needed the records to prepare his report. March 1, 1933 (R. p. 335), Flexner reiterated his demand, and notified Cassell he would have access to the records in the treasurer's office; and on March 22nd (R. pp. 336-7) wrote Cassell, quoting the December 5th action of the Board of Trustees (requiring that the extension property be turned over to the treasurer) recounting the request to turn over the records to the treasurer, and demanding that Cassell submit his report on extension activities at once. Flexner's letter concluded (R. p. 337): 'After the completion of this report your further duties in connection with the Trustee Committee on Extension will be confined solely to the performance of the services which that Committee may call upon you to render in connection with the purchase of further pieces of property. These properties will be administered by the treasurer. You will therefore be free to devote your entire time to the construction projects already assigned to you (as architect) by the Board.' On March 26th (R. p. 338) Cassell telegraphed Flexner, giving further reasons for delay; and on March 29th following again wrote Flexner (R. p. 339, stating that the latter's letter was his first knowledge of the resolution of the trustees turning the management of extension properties over to the University treasurer. The next day Flexner replied that Cassell's duties were to remain 'what they are' until he was otherwise notified, and again requested the report. Subsequently the treasurer of the University sent Cassell a certified copy

of the minutes of the December 5, 1932, meeting of the trustees. (R. pp. 341-3-4.) On April 21, 1933, Cassell sent Flexner his final report of activities in connection with the extension fund. (R. p. 344.) The period covered was from July 30, 1929, to January 1, 1933, and the concluding paragraph of his letter of enclosure was as follows:

“ ‘I thank you for the opportunity of presenting this review of my connection with Howard University's land extension program during the past three years. To date I have received no compensation of any description for this prolonged task. It is my hope that you will recommend to the trustees that I be compensated adequately for these services.’ ”

That his work was completed and his report final can best be shown by his own phraseology, not only in his final report as cited, but in his letter to Dr. Flexner dated May 1934, from which we quote (R. p. 350):

“(c) The fact that as agent for the Howard University Trustee Committee on Extension I handled with care, honesty and success \$805,226.07 in the purchase of properties and \$192,722.34 in gross income from these properties, *before April 21, 1933, the date on which I completed my connection with the Extension Project by transmitting to Dr. Flexner a report covering in detail my activities in connection with this fund.*” (Italics ours.)

and in his letter to Dr. Tobias dated October 21, 1934, both recited in the Opinion of the Court of Appeals, from which we quote:

“ ‘My final report on Extension covering my 3½ years' work was delivered to Dr. Abraham Flexner by registered mail on April 21, 1933, and acknowledged by Dr. Flexner on April 24, 1933. My final letter to Dr. Flexner on this matter requested compensation and Dr. Flexner's letter of April 24, 1933, to me informed me that he was transmitting both my letter and the final report to the then chairman of committee on buildings and

grounds for such action that he deemed proper. (R. p. 391.)

It is illuminating and vital that when the suit was eventually brought in June, 1936, that the amount sought to be recovered was \$26,250.00, the exact amount claimed at the time of the making of the original claim for services when the final account was filed. In spite of the controlling circumstances as here outlined and that in June, 1936, the same figure was asked as was asked covering the services alleged by the plaintiff to have ended as of January 1, 1933, the plaintiff below claimed to meet this position of the running of the Statute by offering evidence tending first of all to show that the plaintiff had performed services for the University within the statutory period, subsequent to the time outlined in his claim as originally filed and that by reason of these things the suit was seasonably brought. The refutation of this position is found in the language of the Court of Appeals before which tribunal the exact position was urged and to which specific and detailed answer was given. We heartily adopt the answers found in the Opinion of the Court of Appeals to the five (5) propositions urged below and reiterated here, as being the things allegedly done after June 4, 1933, causing the suit filed June 4, 1936, to have been seasonably filed:

DETAILED ANSWER TO PETITIONER'S POINTS

(1) "*Negotiations With Landowners.*" The Record discloses that there were certain landowners, including Dean Kelly Miller, who were a part of the University family, being professors over a long period of years, to whom the matter of University acquisition might safely be imparted and with whom Mr. Cassell was authorized to deal in the matter of the purchase of their property; but no negotiations were had by Cassell in this connection subsequent to April, 1933, of such character as would in any wise affect the running of the Statute of Limitations against a claim

of Cassell for services as Agent of the University's Extension Committee. The Court of Appeals' answer to this argument, is here quoted from (R. pp. 1662-1663):

"However, to buttress his argument that his cause of action accrued less than three years before suit, Cassell set forth other activities subsequent to June 4, 1933, which bear on the extension program. Specifically, he lists (1) going to New York City in March or April of 1934 at the request of Dr. Tobias to explain to the Finance Committee the negotiations which had previously been had with Dr. Kelly Miller, a retired professor of the University, looking to the purchase of the latter's property; (2) 'dealing with banks' after June 4, 1933; (3) presenting to the Commission of Fine Arts and the Department of Interior in November, 1933, a blueprint of the plan for Howard University and getting their approval, and (4) negotiations with the University concerning Cassell's liability for the loss occasioned when a check (for rents collected) given him by a sub-agent was not paid because of failure of the drawee bank.

"But the answer is that Cassell never sought any compensation for these things and does not now. He paid his own expenses to New York and never asked for reimbursement. As to that matter, he was merely giving a report on negotiations carried on by him while he was the Extension Committee's agent, and the trip appears to have been primarily to justify his friend Dr. Miller's insistence that the university was morally bound to conclude the purchase of his property."

(2) "*Collaboration With Respondent's Auditor.*" The Record shows, without dispute, and it was then and is now conceded by counsel that through July, 1933, the plaintiff, at the request of the auditors went over with and verified certain items of his, the petitioner's, report, submitted April 21, 1933. It was then urged and is now repeated that the doing of this did not operate to bring the claim of the plaintiff within the statutory period. It was this particular fact and the admitted testimony of Mr. Pope that the "peti-

tioner worked with him * * * and with respondent's auditors through June and July, 1933 (R. p. 1105) which the lower Court gave as a reason why the statutory period had not run. In passing upon this matter the Court of Appeals said (R. p. 1662):

"The record shows absolutely no agreement by or obligation upon Cassell to assist auditors of the university in checking his report. And the fact that he was later requested by the auditors to verify several items cannot under any theory that we know of be considered as prolonging the statutory period of limitations. The 'services' to the auditors outlined in Cassell's testimony consisted in explaining two matters contained in his report which the auditors regarded as questionable. One of these transactions was the purchase of a trust from a member of the Extension Committee and the other matter had to do with a seeming manipulation of purchases from parties designated in the report as Sanders and Saunders. Cassell explained the transactions, thus clearing the names of the university officials involved, including himself. His explanation was a service to himself more than to any other party. If Cassell had a claim against the university, that claim accrued when he filed his final report and in the accompanying letter requested payment; and he could have brought his suit then or at any time thereafter within the three-year period. His rights did not await a check by the university auditors; that was the concern of the university alone. The statute begins to run on the conclusion of the service, where it is not required by agreement or statute that an audit must be made before payment shall be due. *United States vs. Utz*, 80 Fed. 848; *Withers vs. United States*, 69 Ct. Cl. 584; *Carlisle vs. United States*, 29 Ct. Cl. 414."

(3) "*Preparation and Approval of Extension Surveys, Maps, and Plans.*" In one appropriate sentence the Court of Appeals disposes of this contention (R. p. 1663):

"Next, the blue print which Cassell presented to the Commission of Fine Arts had been prepared and trans-

mitted to the university by him in 1932, and the record does not show that he was obligated or asked to submit it to the Commission."

(4) "*Dealings With Banks.*" The testimony on this point was tied in with the dealings with the auditors, commented upon in detail, and shown to be without effect on this question of the running of the Statute of Limitations. The answer from the Court of Appeals comes in the following language (R. p. 1663):

"Concerning the alleged 'dealings with banks', the record shows only that Cassell had conferences with the university auditors (which we have already disposed of) at the Munsey Trust Co., and that the president and one employee of the company did not then know of the revocation of his authority as extension agent."

(5) "*Dealings With Respondent's Sub-agents.*" Were it not demonstrated by the evidence it would hardly be conceivable that the petitioner would continue to urge as an act which would affect the running of the statute an admitted step of negligence on his part, which the University saw fit to hold him responsible for. The Court of Appeals considered it ineffective, and refers to it in the Opinion as here quoted (R. p. 1663):

"As to the non-payment of the check from the sub-agent, that was caused by Cassell's admitted negligence in holding it for more than a month before depositing it in the university's account. The university insisted on Cassell's bearing the loss, and it was this dispute which carried over past June 4, 1933."

The summarizing statement of the Court of Appeals to the effect that these activities did not affect the running of the Statute seems to us unanswerable and leaves no question but that there is no incorrectness necessitating a review. The Court said:

"It is obvious that these activities of Cassell after the latter date do not affect the running of the statute. To hold otherwise would be to make the statute of no effect, for an employee could extend the statute indefinitely by performing gratuitous, voluntary, or self-serving acts from time to time. Here Cassell's extension agency was clearly concluded on April 21, 1933, at the latest, and as we have seen, he recognized this fact by his letters and his actions. And his statement of claims against the university (set forth in his letter of October 21, 1935, to Dr. Tobias) was for three and a half years' extension services. In that letter he stated: 'I was appointed as Agent for Howard University Trustee Committee on Extension in the month of July 1929 * * * and served in this capacity from July 1, 1929 through January 1, 1933, a period of 3½ years * * * My final report on Extension covering my 3½ years work was delivered to Dr. Abraham Flexner by registered mail on April 21, 1933. * * *.' In this letter to Dr. Tobias, Cassell asserted a claim of \$26,250 for his three and a half years' extension services. It is this same exact sum that he seeks in the present suit. Furthermore, the Extension Committee whose agent Cassell was, lost any breath of life it then had when it made its final report on April 21, 1933. On April 11, 1933, the trustees had voted that the Extension Committee be discontinued as of the date of its final report."

**Refutation of Alleged Claim That Respondent Abandoned
the Defense of the Statute of Limitations, or
Was Estopped From Urging Same**

The pretense of the petitioner that defendant below abandoned its position with respect to the reliance on the Statute of Limitations is not borne out by the Record. At the end of the plaintiff's case, defendant made a Motion for a Directed Verdict based primarily on the ground that the Statute of Limitations had run against the action (R. p. 1143). In ruling upon this Motion the Trial Judge specifically took the position that the conference with the auditors admittedly occurring as late as July, 1933 was in and of itself sufficient to make this suit brought in June, 1936 seasonably

brought. (It is to be noted that petitioner does not consider this favorable ruling by the Court a violation of his constitutional right of trial by jury.) Giving the Court the opportunity to correct this ruling, but conceding that there was no testimony disputing this conference with the auditors in July, at the end of the entire case, the Motion for a Directed Verdict was renewed by the defendant, indicating that the defendant's theory was that these conferences with the auditors did not affect the running of the Statute of Limitations. That this was the attitude of counsel representing the defendant and that the point was saved and reserved for appellate review and in no sense abandoned is shown by the language of counsel when renewing the Motion for a Directed Verdict (R. p. 1580):

"Mr. Hayes. Your Honor, I think the first thing for me to do is to renew my motion made at the end of the plaintiff's case. To that end, I suppose that since at that time I attempted in some detail to go into the authorities as well as the question, I might merely indicate to your Honor my renewing of that motion; because, as I understand it, we are required so to do under the rules with respect to the urging of it, *in the event that we desire or should it become necessary to go to the Court of Appeals*. I understand that a motion made at the end of the plaintiff's case and not renewed would be unavailable, your Honor.

"Also, I am mindful that the whole matter might be made a matter of law for your Honor's determination; and I want to know what your Honor's position would be. In the event that were Mr. Magee's attitude, I should want to know, before I renewed that motion, whether or not it would be your Honor's attitude to do what the rules provide, that is, to allow the matter to be submitted to the jury and with the reservation that your Honor might pass on it. If that is the situation and if that is your Honor's attitude, I want to know that before I make any motion, *and want to make that reservation.*"

We interrupt ourselves to ask whether this language sup-

ports the contention of the petitioner that counsel was abandoning the defense of the Statute of Limitations which had been made the basis of the original Motion for a Directed Verdict. In further explanation of the position taken by both counsel and as showing the position of the Court, we quote further from the record (R. pp. 1581, et seq.):

“Mr. Magee. Your Honor, under the procedure in force prior to the adoption of the new rules of procedure, where one party moved for a directed verdict and the other party concurred in that motion—that is to say, where the other party also filed a motion for a directed verdict—the effect was to place all the issues of law and fact upon the Court; but I think under the present rules that is not the law.

“Rule 50(a) states the following:

“‘A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made.’

“I may be utterly wrong about it.

“The Court. What rule is that?

“Mr. Magee. That is rule 50(a) your Honor; and it goes on further and says:

“‘A motion for a directed verdict which is not granted is not a waiver of trial by jury.’

* * * * *

“The Court. Well, there is nothing in the rules to indicate that. The rules say just the contrary (reading):

“‘A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.’

“That is what the rule says.

"Mr. Hayes. Well, perhaps my interpretation is a bit different from what your Honor and Mr. Magee both say. I am perfectly willing to be guided by that interpretation; because I take it that you both mean that the renewal of it would result in nothing, so far as as taking it away from the jury is concerned?

"The Court. That is right."

We have quoted thus at length from the colloquy which took place prior to the renewing of the Motion for a Directed Verdict because we believe it will emphasize the inconsistent position now taken by counsel for the petitioner that although this care was taken and the subsequent language used showed that with deference to the ruling of the Court that counsel for the defendant was relying on the theory that the Court was wrong legally in the position taken, that the defendant abandoned its position with regard to the defense of the Statute of Limitations. The actual words used will doubtless be the best evidence that there was no abandonment of this position, but rather a respectful calling to the attention of the Court what the defendant believed to be an error in his ruling on what legally avoided the running of the Statute. We quote from the Record (R. pp. 1583, 4):

"Mr. Hayes. Therefore, I simply go through the formality of renewing my motion. I say 'formality' because I take it that your Honor's ruling at the end of the plaintiff's case, *particularly on the statute of limitations, would still be your Honor's thought with respect to it; because your Honor indicated the specific thing that you felt kept the statute from running* and said, as I remember it, that without the necessity of passing on the other things the fact remained that there had been these consultations with the auditor and that those consultations were in the nature of the type of of employment that he had always had and that he had always been required to support his reports with the auditor and, therefore, you felt these conferences with the auditor—which admittedly, according to Mr. Pope's testimony, went into the last part of July—were of such

character as would avoid the running of the statute.

"The Court: That is not contradicted anywhere, is it?"

"Mr. Hayes: I was about to say that, that not having been contradicted by the testimony, *I take it that your Honor's ruling would still be as it was, at the present time.*

"The Court: It does not leaving anything from the Court's standpoint, to submit to the jury on a question of fact. If that had been contradicted, it would raise the question of the alternative instructions to the jury: If you believe that was a fact, then the statute of limitations did not run; and if you believe it is not a fact—

"Mr. Hayes (interposing). No; I mean only that the defense was not of such action as amounted to affirmative steps taken as to avoid the statute.

"*Now your Honor by your ruling indicated that you felt that was not correct but that, on the contrary, you felt that the fact that he did these things with the auditor was, of itself, sufficient to toll the running of the statute because if those things were done in July and the case was filed June 4, 1936, the three year period would not have been violated.*

"As I say, we have no testimony to offset that; it is not our theory that we attempt to offset that by testimony. We are accepting that as a fact. *Our position is based on the legal proposition which your Honor has already ruled against. Your Honor has ruled against that, and therefore I say there would be no purpose to renew the motion, under the statute of limitations, and on which your Honor has already ruled.*"

We repeat then what we urged in the Court of Appeals in opposition to the appellee's Motion for a Rehearing. Where, as now, the point is saved by the urging of the Motion, and its renewal, and a discussion with the Court on the ground that it is presumed that the ruling at the end of the entire case would be the same as previously made at the end of the plaintiff's case by reason of the expressed ground upon which the ruling was made; it seems to us folly to say that a deferential suggestion to the Court that the motion is being made to allow of a change of ruling if the

Court were constrained to adopt the defendant's legal theory, but conceding that the factual situation upon which the Court has based its ruling had not been changed by the testimony is properly construed as an abandonment of the defendant's legal position. It is to be noted in this regard that in the Points Relied on in the Brief of Appellant (p. 10) the Running of the Statute of Limitations is set forth as a ground relied on in the appeal. At the end of the plaintiff's case, at the end of the entire case, as a basis of appeal in the Appellate Court, the fact that the cause of action was barred by the Statute of Limitations was urged. When and where was the abandonment?

To abandonment by counsel the petitioner adds an alleged estoppel as operative against the respondent. The petitioner says that the conduct of the respondent after January 1933 estopped it from relying on the Statute. Addressing itself to a summary of the evidence having to do with the theory advanced, the Court of Appeals (R. pp. 1664, 5) gives the full answer, and to do other than to quote same would but labor the point. The Court of Appeals says:

"A careful reading of all of the testimony, which we have summarized, shows very clearly that the university never acknowledged the correctness of the claim or that it owed anything or that it would pay anything. The most that can be said from it all is that there were negotiations looking toward an amicable settlement. Obviously there was strong opposition in the Board of Trustees to the payment of the claim, and the only assurances, if there were any, were to the effect that Cassel would be fairly dealt with. This is not enough to bring into operation the doctrine of equitable estoppel. *Kenyon vs. United Electric Rys.*, 51 R. I. 90, 151 Atl. 5; *Klass vs. City of Detroit*, 129 Mich. 35, 88 N. W. 204; *Howe vs. Sioux City*, 180 Iowa 580, 163 N. W. 411; *City of Athens vs. Evans*, 63 S. W. (2d) 379 (Tex.). See also *Andrae vs. Redfield*, 98 U. S. 225. And the question of arbitration is posed of by what we said in *Hornblower vs. George Washington University*, 31 App. D. C. 64, 75. In that case there was a controversy and

a definite agreement to arbitrate. Of this we said:

" 'If by this agreement to arbitrate, it appears from the record that plaintiffs, by the action of the defendant, were induced not to bring their suit, then we think defendant would be estopped from pleading the bar of the statute of limitations. If, however, after the agreement was made to submit to arbitration, plaintiffs took no steps toward having the matter submitted, and did not insist upon the defendant's submission of the matter, such an agreement, we think, cannot be held to stop the running of the statute . . . It is not sufficient, if it should appear, that defendant failed or even refused to appear before the arbitrator and submit its case. Defendant must have done something that amounted to an affirmative inducement to plaintiffs to delay bringing action!'

"As we have already said, this record does not show that the university actually induced Cassell not to bring his suit. On the contrary, practically from the time of the submission of his claim to the time when he brought his suit, the attitude of the board was one of question, if not indeed of active opposition to payment. And after it became evident that the claim would probably not be recognized, Cassell had ample time and opportunity to bring his suit before the bar of the statute fell. Instead, he even delayed in presenting his claims to the university authorities, resulting in acrimonious correspondence between the university and himself. *It is, therefore, quite out of the question to say that anything the university did lulled Cassell into inaction until after the limitation period.* See *Glennan vs. Lincoln Investment Corporation*, 71 App. D. C. 365, 110 F. (2d) 130, and *Thompson v. Park Savings Bank*, 68 App. D. C. 272, 277, 96 F. (2d) 544, 549."

There Is No Constitutional Question Involved; nor Any Such Interpretation of Rule 50(b) of the Federal Rules of Civil Procedure as Would Justify or Require Certiorari

In an apparent final attempt to get before this Court something that would seem to give it a jurisdictional right

of supervision the questions of an alleged violation of the petitioner's right to a trial by jury and an alleged failure of compliance with Rule 50B of the Federal Rules of Civil Procedure are set out as reasons for the granting of a writ of certiorari.

Of necessity the argument given in support of this alleged Constitutional violation in view of the happenings in this particular case are fallacious and the citations given by the petitioner rather than to show any Constitutional violation, demonstrate to a certainty the correctness of the decision of the Court of Appeals. The rather unusual position taken by the petitioner seems to be that the Court of first instance was correct in construing that a single happening, the conferring of Mr. Cassell with the auditors about a previously filed final report, done within the three-year statutory period, was sufficient to avoid reliance upon the Statute of Limitations; but that the Court of Appeals, in review, went beyond its bounds in construing not only that happening but all others brought out by the evidence as not being such as to affect the running of the Statute and that these matters should be passed upon by the jury. Where, as here, the Court of Appeals has taken each item, detailed by the petitioner and has shown that none of them is of a calibre to affect the running of the Statute, the suggestion that *all* of these might add up to something that is nowhere inherent in the detailed setup seems entirely unfounded. Certain it is that the petitioner argues to no purpose when he takes the position that when the Court passes upon a matter as affecting the running of the Statute in a manner favorable to him that same is allowable but that when the Appellate Court, in review, takes the opposite position that the jury and not the Court should pass upon this legal question and that this adverse ruling violates his Constitutional right, which the favorable ruling by the Trial Judge did not affect. Can it be seriously contended that the jury should determine the legal question as to the nature of the activities of Mr. Cassell which would affect the running of the Stat-

ute? Or, rather, is the Court of Appeals' decision a competent one, when after reviewing all the activities upon which the petitioner then and now relied, it determined that the Statute of Limitations was not affected by any of them? Should or could a jury properly consider or rightfully act upon or arrive at a legal decision of a character as shown by the Court of Appeals determination? It is respectfully urged that the following language of the Court of Appeals was not only eminently correct and supported by the evidence, but that it was wholly within its province to make such a decision. That Court said:

" * * * It is obvious that these activities of Cassell after the latter date do not affect the running of the Statute. To hold otherwise would be to make the Statute of no effect, for an employee could extend the Statute indefinitely by performing gratuitous, voluntary, or self-serving acts from time to time. * * *"

Stating an admitted generality that the Supreme Court of the United States has granted certiorari to protect litigants in their Constitutional right of having disputed issues of fact decided by a jury, the petitioner cites cases in this Court which are in exact opposition to the theory upon which he pretends to advance and which, as we conceive it, can be recited by the petitioner as a precedent for nothing other than that these were cases in which, for whatever reason, petitions for writs of certiorari were granted.

With a recital from a part of the decision in *Berry vs. U. S.*, 312 U. S. 450, counsel appear to urge that this cause is supportive of the novel proposition urged by them. To demonstrate that if this case touches the point here involved at all, its holding is diametrically opposed to the position of counsel for the appellee in the instant case, one needs but look at the case and see its treatment of the right of the Court to pass upon factual situations and its comment with respect to the scope of Rule 50b, to which Rule counsel makes later reference in his unsuccessful attempt to find an analogy between these cases; and to note further speci-

fically that the question of the Statute of Limitations is expressly not included in the Berry case. Not on the question of the running of the Statute of Limitations but in finding that there was sufficient evidence to support a jury's finding on a factual proposition placed before it and supporting the Judge in the lower Court in denying a Motion for a Directed Verdict, the case goes on to state:

"The petition for certiorari presented two questions: First, whether there was sufficient evidence to sustain the verdict; second, whether the Circuit Court of Appeals erred in dismissing the cause instead of remanding it for a new trial. This second question invoked our jurisdiction in order to obtain an authoritative construction of subdivision (b) of Rule 50 of the Rules of Civil Procedure. In part that subdivision provides: 'Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict *may* move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. * * *' Since the government made no such motion within ten days after the verdict, petitioner urged here that the Circuit Court of Appeals was without power to dismiss the cause but should have remanded it for a new trial. But while this important point, upon which the Circuit Court of Appeals are not in complete agreement, is one of the two questions upon which the petition for certiorari rested, *there is no occasion for us to reach it here. For we find that there was sufficient evidence to sustain the jury's verdict, and we hold that the District Court properly denied the government's motion for a directed verdict in its favor.* (Italics ours.)

Let us suppose for the sake of the statement that the Supreme Court of the United States had found that the plaintiff had not produced sufficient evidence to justify sub-

mission of the cause to the jury, as the Circuit Court of Appeals found, can it be argued that they would have sent the case back to be tried over again or would they have sent it back with instructions that the Government's motion for a directed verdict should be recognized. In such consideration let the distinction be borne in mind that distinguishable from the instant case, in the Berry case the Government did not make a motion for a new trial nor for a judgment notwithstanding the verdict, whereas in the instant case a motion was made for a new trial and this matter of the Statute of Limitations was brought to the attention of the Trial Judge, who took the position that there had been no testimony since the time of his ruling at the end of the plaintiff's case which would change his decision then made that certain services performed by the appellee kept the Statute from running as they were performed within the Statutory period. As between the two (2) cases the distinction is also drawn that in the Berry case the Courts were respectively passing upon the sufficiency of evidence to go to the jury whereas in the instant case the question involved was that of the running of the Statute of Limitations, the determination of which would control the right to bring or try a cause of action.

The impropriety and futility under the circumstances of making a Motion for Judgment Notwithstanding the Verdict, to reach this question of the Statute of Limitations is shown as to its impropriety by an appreciation of the fact that a judgment "*non obstante veredicto*" is granted where there is first of all a setup in the pleadings of a confession of right in the party seeking such a judgment but for certain "circumstances" outlined in the pleadings which allow the moving party to take the position that the proof has failed to support the "circumstances" that avoid the right confessed and that therefore the Court, notwithstanding the verdict of the jury should predicate its judgment of this confessed right and the failure in the proof and should consequently enter judgment for the movant. The futility and

lack of requirement of making such a motion is shown by the Supreme Court of the United States' discussion of what the scope of this rule is and the nature of the authority which it now vests in the Trial Judge. The apparent purpose of the Rule is seen from this citation from the *Berry* case, *supra*:

"Rule 50(b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (*but not the mandatory duty*) to enter a judgment contrary to the jury's without granting a new trial. But that rule has not taken away from the juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

In other words, the Trial Judge by having this Rule invoked may enter a judgment contrary to the jury's finding without granting a new trial. Could there be any argument more fatal to the appellee's position and with a Motion for a New Trial filed and the Court persisting in its position as to factual situations which in its opinion kept the Statute from running, can there be any possible merit in the pretended position that any formal step required was omitted? With the Court overruling the Motion for a New Trial with the question of the Statute of Limitations before it, can it be said that the appellant was called upon to ask him to go the additional distance of setting aside the verdict and not only grant a new trial (which he had refused), but, on this point of the Statute of Limitations to enter judgment in the appellant's favor? No such futile step was ever contemplated in the law and this broadened right (not duty) of the Trial Judge would not and could not have been exercised in view of his ruling on the Motion for a New Trial.

Admittedly the procedure allowable under subdivision (b) of Rule 50 of the Federal Rules of Civil Procedure is an important item for decision and this Court has said

so in the cases of *Berry vs. U. S.* and *Conway vs. O'Brien*, hereinbefore cited and again in the case of *Halliday vs. U. S.*, appearing in the *Law Ed. Advance Opinions*, vol. 86, No. 6 at page 394. In each of these cases the question as to whether the judgment directed by the upper Court could be entered without a new trial was not reached because of the determination of this Court that the evidence was sufficient to support the verdict; but there would seem to be no question but that what happened in the instant case is definitely allowable under the theory of all of the cases. Certain it is, if as held, the right of review of the factual situation by the Appellate Court and by the Supreme Court of the United States was such in each instance as to render unnecessary the passing upon this procedural proposition under subdivision (b) of Rule 50 of the Rules of Federal Procedure, in this case the right of the Appellate Court to pass upon a legal ruling of the lower Court would seem to be directly conceded. In the *Halliday* case, this Court has said:

"Petitioner sought certiorari on two grounds: that the Circuit Court of Appeals had erred in holding that there was insufficient evidence for the jury; and that, even if the evidence was insufficient, under Rule 50(b) of the Rules of Civil Procedure the Circuit Court was without power to direct entry of judgment for the government without a new trial. We granted certiorari (— *U. S.* —, ante, 56, 62 S. Ct. 62) as we had in *Berry vs. United States* and *Conway vs. O'Brien*, because of the importance of the question concerning Rule 50(b). However, as in those cases, we do not reach that problem since we are of the opinion that the evidence was sufficient to support the verdict."

In comment upon this same case we find in the *Cumulative Annual Pocket Part of the U. S. Code Annotated*, Title 28—1941—the exact answer to the question raised by counsel as to the right of the appellate court to remand the cause with instructions to dismiss, in this unambiguous language:

“Government’s failure to move in District Court for judgment notwithstanding jury’s verdict for plaintiff after denial of government’s motion for directed verdict at close of evidence, without express reservation of decision, does not restrict power of Circuit Court of Appeals to direct entry of such judgment in District Court, instead of ordering that new trial be granted, on reversal of judgment on such verdict, though government failed to file motion in District Court after verdict for entry of judgment in accordance with its motion for directed verdict, as denial of such motion was equivalent to reservation of decision. *U. S. vs. Halliday*, C. C. A. S. C. 1941, 116 F. (2d) 812.”

A comprehensive review of cases showing the power of the Appellate Court where a trial court denies a motion for judgment is found in the annotations compiled in 311 U. S. following the case of *Montgomery Ward & Co. vs. Duncan*, 311 U. S. 254, 5, and same is recited from at some length to demonstrate that an authoritative interpretation of subdivision (b) of Rule 50 of the Federal Rules of Civil Procedure as it in any wise affects the instant case has been had.

“Where the trial court denies the moving party’s motion for judgment under Rule 50(b), the reviewing court may—reverse with directions to enter judgment for the movant in accordance with his motion for a directed verdict. *Eastern Livestock Co-op Marketing Asso. vs. Dickenson* (1939; CCA 4th) 107 F. (2d) 116; and amply other supporting citations. * * *

“Where the trial court erred in denying a party’s motion for a directed verdict and entered judgment on the verdict in favor of the other party, prior to the adoption of the new Federal rules, the reviewing court could not direct an entry of judgment in favor of the other party in accordance with his motion for a directed verdict, but could only remand with directions to order a new trial, unless the trial court expressly reserved its decision on the motion for directed verdict, or unless the jury returned an alternative verdict. See *supra* II.

However, under Rule 50(b) an express reservation or the taking of an alternative verdict is no longer a condition precedent to the directing by the appellate court of a judgment for the other party, since the reservation is automatic. (Ample supporting citations.)

"This provision was held not to violate the Seventh Amendment to the Federal Constitution, in *Brunet vs. S. S. Kresge Co.* (1940; CCA 7th) 115 F. (2d) 713, *supra*. See *supra*, II.

*"In United States vs. Halliday (1941; CCA 4th) 116 F. (2d) 812, it was held that the appellate court could direct an entry of judgment in accordance with a motion for a directed verdict, notwithstanding that the party had failed to move for judgment under Rule 50(b), but had merely moved for a new trial. To the same effect, see Conway vs. O'Brien (1940); CCA (2d) 111 F. (2d) 611 (reversed on the merits in (1941) 312 U. S. 492, post, 969, 61 S. Ct. 634), discussed *supra*, III g, and Berry vs. United States (1940; CCA 2d) 111 F. (2d) 615) reversed on the merits in (1941) 312 U. S. 450, post, 945, 61 S. Ct. 637), discussed *supra*, III g.*

"In *Brunet vs. S. S. Kresge Co.* (F) *supra*, the court said: 'Here, motion was duly made for the directed verdict, which was taken under advisement and later denied. Without the new rule, this would undoubtedly bring the case within the purview of the *Slocum Case* (1913) 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523, Ann. Cas. 1914D 1029, and we would be required to remand for new trial. However, within ten days after reception of the verdict, appellant filed two motions, one to set aside the verdict and for new trial, and the other to set aside the verdict and enter judgment notwithstanding the verdict. Both are duly denied, and judgment entered on the verdict. *We think this action of the defendant preserved its rights under the rule, so that it is now entitled to direction of a judgment without new trial.*'

"In *Conway vs. O'Brien* (1940; CCA 2d) 111 F. (2d) 611 (reversed on the merits in (1941) 312 U. S. 492, post, 969, 61 S. Ct. 634), the Circuit Court of Appeals said:

'The defendant moved for a verdict at the close of the evidence, and the court denied it without reserving decision. Before the new rules * * * that would not have allowed us to dismiss the complaint under *Baltimore & C. Line vs. Redman* (1935) 295 U. S. 654, 79 L. ed. 1636, 55 S. Ct. 890; but Rule 50(b) provides that when such a motion is denied at the close of the evidence, the judge is to be "deemed to have submitted the action to the jury subject to a later determination;" which is the equivalent of a reservation. * * * Hence it is proper here to dismiss the complaint (seemingly upon the merits, as was true in the *Redman Case*).'

"The plaintiff argues that if there is a reversal, the case should be sent back for a new trial—citing *Slocum vs. New York L. Ins. Co.* (1913) 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523, Ann. Cas. 1914D, 1029 (discussed supra, II). Under the rule announced by the Supreme Court of the United States in *Baltimore & C. Line vs. Redman* (1935) 295 U. S. 654, 79 L. ed. 1636, 55 S. Ct. 890 (discussed supra, II), as implemented by Rule 50(b) * * *, the defendant * * * *is entitled to have judgment entered in its favor, the court below having erred in denying the defendant's motion for a directed verdict and having also erred in not granting judgment notwithstanding the verdict.*" *Massachusetts Protective Asso. vs. Moubert* (1940; CCA 8th) 110 F. (2d) 203.

"In *Ferro Concrete Constr. Co. vs. United States* (1940; CCA 1st) 112 F. (2d) 488 (writ of certiorari denied in (1940) 311 U. S. 697, post, 452, 61 S. Ct. 136) the court said: 'The case having been tried after the Federal Rules of Civil Procedure had gone into effect, the denial of the defendant's motion for a directed verdict was equivalent to a submission of the action to the jury "subject to a later determination of the legal questions raised by the motion."' Rule 50, 28 USCA following sec. 723c. The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for a directed verdict, there is no occasion for a new trial of the issues involved in the plaintiff's claim. The verdict for the plaintiff should be set aside, the

judgment vacated and judgment for the defendant entered.'

"The appellant reserved its point of law as to its liability by requesting a directed verdict, Rule 50(b), * * * which the trial judge refused, and assigns for error the trial court's denial of its motions for judgment n. o. v. It is our duty to determine whether the action of the court below was proper and, if not, we may direct the entry of the appropriate judgment. * * * A verdict should not be allowed to stand if, after resolving all inferences from the evidence most strongly against the one complaining of the verdict, there appears to be no legal substance to support it." *Waggaman vs. General Finance Co.* (1940; CCA 3d) 116 F. (2d) 254.

The authority granted under the new rules is thus exhaustively shown, but no reasonable pretense can be had from these authorities that the vain thing urged by the petitioner could ever be controlling as denying to the litigant the very thing that the Rule attempts to assure to him. The respondent's Motion for a Directed Verdict, at the close of the plaintiff's case and renewed at the end of the entire case, overruled by the Trial Court, was a matter reserved for the review of the Appellate Court; its reversal of the lower Court's decision on the legal question involved rendered impractical the remanding for a new trial but since it found that the cause of action had not been seasonably brought there remained no alternative but to remand with instructions to dismiss, for which the cases hereinbefore cited show ample authority.

That what was done in the instant case was no denial to the petitioner of the constitutional right of trial by jury is stated in express terms in the case of *Brunet vs. S. S. Kresge Co.*, 115 Fed. (2) 713. The syllabus in this case says:

"Where reviewing court vacated judgment for plaintiff on ground of insufficiency of evidence, *action of court in reversing and remanding with directions to*

dismiss on the merits, without remanding for a new trial, did not deny plaintiff the constitutional right to trial by jury, where, within ten days after reception of verdict for plaintiff, defendant filed motions, one to set aside the verdict and for a new trial, and the other to set aside the verdict and enter judgment notwithstanding the verdict, and both were denied and judgment entered on the verdict, since, by such action defendant reserved its right under the Rule of Civil Procedure relating to reservation of a decision on a motion for a directed verdict so that it was entitled to direction of judgment without a new trial. Rules of Civil Procedure, rule 50(b), 28 U. S. C. A. following section 723e."

The rule here laid down, it is respectfully submitted, is in no wise changed whereas in the instant case a Motion for a New Trial and not a Motion for Judgment non obstante veredicto was filed—for the point has been held to be reserved where neither was filed.

The Court of Appeals, as hereinbefore outlined, has given its answer to the last claim of the petitioner that there was an abandonment of the defense of the Statute of Limitations and that the respondent's actions estopped it from relying on the Statute. We may unquestionably and emphatically add that no action of the respondent either induced inactivity on the part of the petitioner or lulled him into delaying the filing of his suit.

The facility of citation, not only of cases not in point, but of those supportive of the respondent's theory as embraced by the Court of Appeals, is constantly demonstrated by the petitioner. The case of Hornblower vs. George Washington University, 31 App. D. C. 64, was formerly and is now relied on by the respondent and pertinent language therefrom is cited by the Court of Appeals in its Opinion; but we find the petitioner citing same. There must be poor consolation to the petitioner in his attempt to allege that certain extraneous action affects the running of the Statutes of Limitation in this quotation from the Hornblower Case:

"In *Hornblower vs. George Washington University*, 31 App. D. C. 64, we held that an architect's right of action did not even await the presentation of his bill. And the situation here is entirely different from those cases which arise under statutes requiring submission of the claim to audit and settlement by a proper department of government as a condition precedent to the liability of the defendant."

CONCLUSION

It is respectfully submitted that the petition for certiorari to bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia should be denied.

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April 14, 1942.